LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 22 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER
6505 Wilshire Boulevard
Los Angeles, California 90048

Attorneys for Petitioners

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. _____

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER
6505 Wilshire Boulevard
Los Angeles, California 90048

Attorneys for Petitioners

TOPICAL INDEX

	Page
Table of Authorities	iii
CITATION TO OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING CERTIORARI	8
1. The Problems Presented Are of Widespread Importance and Ripe for Decision.	8
2. The Present Rule Denying Compensation for Goodwill Rests on the Rationale That in the Absence of Statutes Goodwill is Not "Property", But California Statutes Expressly Declare Goodwill to Be "Property"; Compensability of Goodwill Therefore Follows Logically From the Fifth Amendment Command That Just Compensation Be Paid for Taking of "Property".	13

Page

3. Under the Incorporation Doctrine, Provisions of the Fifth Amendment are Binding on the States Through the Due Process Clause of the Fourteenth Amendment, and Hence U.S. v. General Motors is Binding in State Condemnations Involving Temporary Takings. 17

CONCLUSION 20

APPENDIX "A"

Opinion of the Court of Appeal, Second Appellate District, filed July 28, 1969 A-1

TABLE OF AUTHORITIES

Cases	Page
Armstrong v. U.S. (1960) 364 U.S. 40	11, 14
Berman v. Parker (1954) 348 U.S. 26	11
Boston Chamber of Commerce v. Boston (1910) 217 U.S. 189	16
Carrey v. Boyes Hot Springs, etc. (1966) 245 Cal. App. 2d 618, 54 Cal. Rptr. 199	14, 16
Chicago B. & Q. R. Co. v. Chicago (1896) 166 U.S. 224	17
Donleavey v. Johnston (1914) 24 Cal. App. 319, 141 Pac. 229	16
Drouet v. Moulton (1966) 245 Cal. App. 2d 667, 54 Cal. Rptr. 278	16
Gideon v. Wainwright (1963) 372 U.S. 335	17
Kimball Laundry v. U.S. (1949) 338 U.S. 1	15, 18

Cases	Page
Miller v. Hall (1944) 65 Cal. App. 2d 200, 150 P. 2d 287	14, 16
Ruzanoff v. Retailers Credit Assoc. (1929) 97 Cal. App. 682, 276 Pac. 156	16
Sauer v. New York (1907) 206 U.S. 536	14
Smith v. Bull (1958) 50 Cal. 2d 294, 325 P. 2d 463	16
U.S. v. Causby (1945) 328 U.S. 256	14
U.S. v. Certain Parcels, etc. (1945) 63 F. Supp. 175	19
U.S. v. Certain Property, etc. (1962) 306 F. 2d 439	14
U.S. v. Certain Property, etc. (1965) 344 F. 2d 142	14
U.S. v. Commodity Trading Corp. (1950) 339 U.S. 121	21
U.S. v. General Motors Corporation (1945) 323 U.S. 373	3, 8, 17-20

Cases	Page
U.S. ex rel. TVA v. Powelson (1943) 319 U.S. 266	14
U.S. v. Virginia P & E Co. (1961) 365 U.S. 624	21
U.S. v. Willow River Power Co. (1945) 324 U.S. 499	13, 15

Constitution	
U.S. Constitution	
Fifth Amendment	3, 13, 14, 16, 17, 20
Fourteenth Amendment	3, 17

Statutes	
California Business & Professions Code:	
§ 14102, Stats. 1941, c. 57, p. 702, § 1	3, 14, 15
California Civil Code:	
§ 654	3, 14
§ 655	4, 14
28 U.S.C. § 1257(3)	2

Texts	Page
Aloi and Goldberg, A Reexamination of Value, Good Will and Business Losses in Eminent Domain, 53 Cornell L. R. 604 (1968)	9
Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses, 67 Yale L. J. 61 (1957)	9, 21
"Just Compensation" for the Small Businessman, 2 Columbia Jour. of Law and Social Problems 144 (1966)	9
Sange, The Unsoundness of California Non-compensability Rule as Applied to Business Losses in Condemnation Cases, 20 Hastings L. J. 675 (1969)	9
Slavitt, More Inequities and Injustices of Condemnation Acquisitions, 43 Conn. Bar Jour. 89 (1969)	9
Spies and McCoid, Recovery of Consequential Damages in Eminent Domain, 48 Va. L. R. 437 (1962)	9

Miscellaneous	
Hearings Before the Committee on Public Works, House of Representatives on H. R. 386 and Related Bills, 90th Congress, 2nd Session (1968)	10

Miscellaneous

	Page
Lublin, Tenants' Revolt Hits a Luxury High Rise; Target is FHA, The Wall Street Journal, August 13, 1969, p. 10	11
Relocation: Unequal Treatment of People and Businesses Displaced by Governments, Advisory Committee on Intergovernmental Relations (January 1965) pp. 5-6	8, 21
Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs, House Committee on Public Works, 88th Congress, 2nd Session, Committee Print No. 31 (1964) p. 105	8, 10

Rules

California Rules of Court:	
Rule 7	4
Rule 967(c)	2
Rules of the Supreme Court of the United States:	
Rule 23	11

7

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. ———

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Petitioners Sol Siegel and Bessie Siegel pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled case.

CITATION TO OPINION BELOW

The decision of the Court of Appeal of the State of California, Second Appellate District, was by means of an opinion certified for non-publication under Rule 967(c), California Rules of Court, and is therefore not reported. A copy of that opinion appears in Appendix A hereto, and a certified copy of the slip opinion is included in the record filed herewith.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, sought to be reviewed herein, was filed and entered on July 28, 1969. A timely petition for a rehearing was denied on August 19, 1969. A timely petition for hearing in the Supreme Court of the State of California was denied on September 24, 1969, Mr. Justice Peters dissenting. The jurisdiction of the United States Supreme Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Where a state repeatedly declares by statutory enactments that a marketable economic interest (i.e., the goodwill of a business) is

"property", and where in a condemnation action the condemnee suffers a loss of goodwill, do the due process clause of the Fourteenth Amendment and the just compensation clause of the Fifth Amendment require that just compensation be paid to the condemnee for the loss of goodwill suffered by him?

2. Is this Court's construction of the just compensation clause of the Fifth Amendment, as applied to temporary condemnations in U.S. v. General Motors Corporation (1945) 323 U.S. 373, binding on the states in state condemnation proceedings?

STATUTES INVOLVED

The statutes whose construction is involved herein are as follows:

1. "The goodwill of a business is property and is transferable." Calif. Business & Professions Code § 14102, Stats. 1941, c. 57, p. 702, § 1.

2. "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property." Calif. Civil Code § 654. (Pertinent portion underscored).

3. "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trademarks and signs, and of rights created or granted by statute." Calif. Civil Code § 655. (Pertinent portion underscored).

STATEMENT

Petitioners' appeal in the State courts was prosecuted under a settled statement, pursuant to Rule 7, California Rules of Court. The narrative statement thereof is contained at the beginning of the certified record, and is repeated hereat verbatim:

> "This case arises from a condemnation by the City of Los Angeles (City) for street widening purposes on Hoover Avenue in the City of Los Angeles. The property owners, Defendants and Appellants Sold Siegel and Bessie Siegel (Siegel), operated a dime store and dress shop on the premises. A portion was leased to others for a liquor store.
>
> "The Siegels' property was 11800 square feet (118' x 100'). It had three structures of brick construction built about 1916.

"The City taking was of 2056 square feet (17' x 118') for a permanent street easement. The 9744 square foot remainder of the property was taken temporarily for purposes of removal of the three structures partially within and partially without the permanent taking area.

"The dress shop and dime store were typical lower class economic neighborhood operations with the usual staple and style merchandise found in such stores.

"The two businesses of Siegel produced a net profit for the year preceding the condemnation. The business had a good will.

"The court, before hearing valuation testimony, determined as preliminary issues:

"1. Whether damages from loss of business resulting from the taking were compensable.

"2. Whether loss of good will resulting from the taking is compensable.

"3. Whether the cost of moving inventory to storage, storing it until a new building had been reconstructed on the remainder of the subject property, and moving it back to said remainder,

including loss in value of said inventory during said moving and storage is compensable.

"4. Whether loss of use of the remainder of the subject property during the period of reconstruction of a new building was compensable.

"The court found that the Siegels will suffer loss of business profits, loss of good will, reduction in the value of equipment not permanently affixed caused by its severance from the parcel being taken for street widening and the temporary taking parcel, costs of moving inventory, storing it, and moving it back to the remainder; and that said inventory will suffer a loss of value during said moving and storage, a loss of use of the remainder during the period of reconstruction of the new building. The court found all of the above items to be the result of the taking but non-compensable.

"The court then heard and determined land values, improvement values, and damage to the remaining land. These are not involved in this appeal."

The federal questions herein were presented to the trial court by agreement of parties as issues going to the extent of items compensable under the constitutional mandate of the just

compensation clauses. See CR 49:12-18. [1/] Petitioners generally raised the federal issues by praying for just compensation in their answer (CR 25) at the very outset of the case. The issues were then refined at the time of the first pretrial conference, as evidenced by provisions of the first pretrial conference order (CR 49).

The trial court expressly found that Petitioners "... will suffer a loss of goodwill as a result of the taking herein" (CR 30:6-7). The trial court also found that as a result of the temporary taking of Petitioners' land, Petitioners " ... will incur costs of moving inventory to storage, storing it, and moving it back to said remainder and that said inventory will suffer a loss of value during said moving and storage." (CR 30:17-20). The trial court denied Petitioners any compensation for the above damage suffered thereby (CR 33:9-16).

Following the adverse adjudication by the trial court, Petitioners appealed to the Court of Appeal of the State of California, Second Appellate District. The federal questions raised herein were expressly presented to the Court of Appeal by a statement of issues presented and arguments in Petitioners' briefs (there are no formal assignments of error under California practice).

1/ The abbreviation CR refers to the certified record filed herewith.

The Court of Appeal affirmed by the opinion attached hereto as Appendix A. As may be readily seen from that opinion, the case at bench was decided squarely on the federal issues of (a) right to just compensation for the taking of "property", and (b) applicability of the U.S. v. General Motors rule to the facts at bench.

REASONS FOR GRANTING CERTIORARI

1. The Problems Presented Are of Widespread Importance and Ripe for Decision.

The increasing population growth and attendant governmental activities have of late caused a nation-wide explosion in governmental land acquisition through eminent domain. "The amount of disruption caused by Federal and federally assisted programs is astoundingly large." 2/

2/ "Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs", House Committee on Public Works, 88th Congress, 2nd Session, Committee Print No. 31 (1964), p. 105. Note statistics on the extent of existing and projected displacement. Likewise, see "Relocation: Unequal Treatment of People and Businesses Displaced by Governments", Advisory Commission on Intergovernmental Relations (January 1965), pp. 5-6, and note statistics at pp. 24-26.

One consequence thereof has been an increasing degree of concern [3/] over the grossly inadequate compensation received by an ever-growing segment of the population whose homes and businesses increasingly find themselves in the path of

---

3/ "Eminent Domain Valuations in An Age of Redevelopment: Incidental Losses", 67 Yale L.J. 61, 74-76 (1957);

Spies and McCoid, "Recovery of Consequential Damages in Eminent Domain", 48 Va. L.R. 437 (1962) - particularly see discussion at p. 451;

" 'Just Compensation' for the Small Businessman", 2 Columbia Jour. of Law and Social Problems 144 (1966), passim;

Aloi and Goldberg, "A Reexamination of Value, Good Will, and Business losses in Eminent Domain", 53 Cornell L.R. 604 (1968), passim;

Sange, "The Unsoundness of California's Non-compensability Rule as Applied to Business Losses in Condemnation Cases", 20 Hastings L.J. 675 (1969), passim;

Slavitt, "More Inequities and Injustices of Condemnation Acquisitions", 43 Conn. Bar Jour. 89, 101-103 (1969).

These commentators are unanimous in criticizing the present rule of non-compensability of goodwill. No one defends the status quo.

freeways, urban renewal projects, and other large-scale governmental land acquisition programs. 4/

Of particular concern to all who have studied the problem is the vicious injustice inflicted by the present rules upon small businessmen who find themselves in the path of such public projects. All who have studied the problem agree that without any fault or rational reason, growing numbers of small businessmen are economically exterminated 5/ in the name of "public improvement" whose ultimate usage inures to the economic benefit of certain business interests such as heavy highway users and corporations engaged in large scale construction in urban

---

4/ See Hearings Before The Committee on Public Works, House of Representatives on H.R. 386 and Related Bills, 90th Congress, 2nd Session (1968); particularly see Statement of Hon. Jonathan B. Bingham, at p. 467.

5/ See "Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs", (cited in fn. 1, supra), at p. 484, concluding that 62 to 68% of the business proprietorships displaced by governmental land acquisitions are discontinued, as are 9% of displaced corporations.

redevelopment areas. 6/ Just compensation becomes a casualty in this process, and those who suffer most, are least able to bear the economic burden of the injustice.

In light of the authorities cited in the footnotes and Petitioners' obligation to adhere to the commands of conciseness contained in Rule 23, Petitioners will not belabor these matters here. They do, however, respectfully and earnestly urge the Court that it peruse the authorities cited in the footnotes as they paint a grim picture of wholesale injustice inflicted by the courts in the name of just compensation. This is a situation which in the final analysis boils down to an antithesis of this Court's exposition of the rationale of just compensation stated in Armstrong v. U.S. (1960) 364 U.S. 40, 49, where the Court said:

> "The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people alone to

---

6/ For a penetrating insight on this point, see Lublin, "Tenants' Revolt Hits a Luxury High Rise; Target is FHA", The Wall Street Journal, August 13, 1969, p. 10, reporting that affluent tenants (income range $10,000 to $40,000) are revolting against excessive rents charged for apartments built in southwest Washington, D.C., on the site of the urban renewal project which gave rise to the celebrated decision of Berman v. Parker (1954) 348 U.S. 26.

bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The reality of condemnation, insofar as applicable to small businessmen around the country, is just the opposite. The operation of the present rules concerning compensability of goodwill and other business assets forces these people to bear grossly disproportionate public burdens. The government, moreover, adds insult to injury: the goodwill of a business is universally recognized as taxable property and is taxed by state and federal governments. Yet, when in a condemnation action, goodwill is destroyed, the same government successfully asserts that no compensation should be paid on the remarkable ground that the goodwill - which was just taxed as property - is not property when it comes to eminent domain, or on the even more remarkable ground that the goodwill - which the government just valued for taxation purposes - cannot be valued when it comes to eminent domain.

The status quo is thus Kafkaesque. It is shockingly unfair and calls at the very least for a fundamental examination by this Court. If the present rule of no compensation for taking of goodwill is to remain in effect, some morally and logically supportable rationale therefor should be articulated by the judiciary. As things now stand, there is none. The constitutional promise of just compensation is, for a multitude of citizens, reduced to a hollow mockery of mere words without substance.

2. The Present Rule Denying Compensation for Goodwill Rests on the Rationale That in the Absence of Statutes Goodwill is Not "Property", But California Statutes Expressly Declare Goodwill to Be "Property"; Compensability of Goodwill Therefore Follows Logically From the Fifth Amendment Command That Just Compensation Be Paid for Taking of "Property".

Petitioners' contentions are logically based on this Court's premise that the constitutional test of compensability of an economic interest turns on whether the interest in question is "property":

> " . . .[W]hether it is a property right is really the question to be answered." U.S. v. Willow River Power Co. (1945) 324 U.S. 499, 503.

Likewise see U.S. ex rel. TVA v. Powelson (1943) 319 U.S. 266, 280, where the Court explains that the right to just compensation hinges on whether the interest impaired by the government's exercise of the power of eminent domain rises to the status of "private property". 7/

The goodwill of a business is "property" in California both by repeated statutory enactments and by settled decisional law (Miller v. Hall (1944) 65 Cal. App. 2d 200, 205, 150 P. 2d 287; Carrey v. Boyes Hot Springs, etc. (1966) 245 Cal. App. 2d 618, 623, 54 Cal. Rptr. 199). This Court has repeatedly indicated that for purposes of determining the right to just compensation under the Fifth Amendment, it will accept the state definition of "property". Sauer v. New York (1907) 206 U.S. 536, 548; U.S. ex rel. TVA v. Powelson (1943) 319 U.S. 266, 279; U.S. v. Causby (1945) 328 U.S. 256, 266; Armstrong v. U.S. (1960) 364 U.S. 40, 44. Also see the analysis of this point by the U.S. Court of Appeals for the Second Circuit in U.S. v. Certain Property, etc. (1962) 306 F. 2d 439, 444-445 and U.S. v. Certain Property, etc. (1965) 344 F. 2d 142, 144-145.

7/ Petitioners are aware that this Court has in the past denied compensation for goodwill. Petitioners believe, however, that the Court has not in the past had before it, in the context of eminent domain, an express statutory declaration that "The goodwill of a business is property ...". Calif. Business and Professions Code, § 14102. And see Calif. Civil Code § § 654, 655.

Goodwill, moreover, under California law readily meets the other tests of compensable "property" established by decisions of this Court, namely:

(a) "The value compensable under the Fifth Amendment therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent." Kimball Laundry v. U.S. (1949) 338 U.S. 1, 5-6.

In California, goodwill is "capable of transfer from owner to owner" by express statutory provisions: California Business & Professions Code §14102, Stats. 1941, c. 57, p. 702, §1.

(b) " . . . only those economic advantages are [property] 'rights' which have the law back of them, and only when they are so recognized may court compel others to forbear from interfering with them or to compensate for their invasion." U.S. v. Willow River Power Co. (1944) 324 U.S. 499, 502.

In California goodwill "has the law back of [it]" and the state courts

routinely so recognize it, and compel others "to compensate for [its] invasion." See Donleavey v. Johnston (1914) 24 Cal. App. 319, 326-327, 141 Pac. 229; Ruzanoff v. Retailers Credit Assoc. (1929) 97 Cal. App. 682, 687, 276 Pac. 156; Miller v. Hall (1944) 65 Cal. App. 2d 200, 205, 150 P. 2d 287; Smith v. Bull (1958) 50 Cal. 2d 294, 306, 325 P. 2d 463; Carrey v. Boyes Hot Springs etc. (1966) 245 Cal. App. 2d 618, 623, 54 Cal. Rptr. 199; Drouet v. Moulton (1966) 245 Cal. App. 2d 667, 672, 54 Cal. Rptr. 278.

In short, not only is goodwill declared by California statutory law to be "property", but its legal attributes readily meet the tests established by this Court to determine whether an economic interest is "property" within the meaning of the Fifth Amendment's just compensation clause.

Petitioners submit that as a matter of logic - to say nothing of justice - once an economic interest meets the tests of "property", it is necessarily compensable under the Fifth Amendment's command that just compensation must be paid when "property" is taken. 8/ Any other

---

8/ " . . . the question is, What has the owner lost? not, What has the taker gained?" Boston Chamber of Commerce v. Boston (1910) 217 U.S. 189, 195.

argument compels the Orwellian-sounding conclusion that property isn't property, or even worse, that property is property only when the result suits the government. Surely, the fundamental just compensation guarantee of the Fifth Amendment must rest on a foundation made of sounder stuff.

3. Under the Incorporation Doctrine, Provisions of the Fifth Amendment are Binding on the States Through the Due Process Clause of the Fourteenth Amendment, and Hence U.S. v. General Motors is Binding in State Condemnations Involving Temporary Takings.

It is by now well settled that under the incorporation doctrine the just compensation clause of the 5th Amendment is binding on the states. See discussion of underlying policy in Gideon v. Wainwright (1963) 372 U.S. 335, 341-342. Indeed, the first instance of the incorporation doctrine was an eminent domain case: Chicago B. & Q. R. Co. v. Chicago (1896) 166 U.S. 224.

In U.S. v. General Motors, 323 U.S. 373, this Court construed the just compensation requirements of the Fifth Amendment as applied to temporary condemnations, and concluded that because a temporary taking inflicts on the owner expenditures and damages not present

in a permanent taking, the rules of compensation must in fairness be different. As Mr. Justice Rutledge put it in discussing General Motors in a later case:

> "As I understand the opinion of the Court, its effect is simply to recognize that short term takings of property entail considerations not present where complete title has been taken. Rules developed for the simple situation in which all the owner's interest in the property have been irrevocably severed should not be forced to fit the more complex consequences of a piecemeal taking of successive short term interests. Such taking may involve compensable elements that in the nature of things are not present where the whole is taken." Kimball Laundry Co. v. U.S. (1948) 338 U.S. 1, 21-22.

It does not seem open to serious argument that this Court's construction of the Constitution in General Motors is binding on the states in like cases, involving temporary takings.

Nonetheless, in the case at bench, Petitioners were deprived of the benefit of the

General Motors rule. 9/ Although the taking herein was temporary (just as in General Motors) and compelled petitioners to move out, store their merchandise and equipment, and then after the City was done with the subject property, to restore it to usable condition and move back in (just as General Motors had to do), Petitioners' just compensation did not reflect any of the costs incurred thereby. Contrary to General Motors which requires that such costs (323 U.S. at 376) be considered when fixing just compensation (323 U.S. at 383), the trial court herein refused to consider the impact of being forced to move out, store personal property for the duration of the temporary taking, and then move back in. The trial court excluded any evidence of the damage suffered thereby, or its influence on the just compensation due petitioners (See CR 33:14-16). 10/

9/ Bearing in mind that the City of Los Angeles is the condemnor herein, the result is particularly unjust, as the City - when it was a condemnee - claimed and received for itself the benefit of the General Motors rule. See U.S. v. Certain Parcels, etc. (1945) 63 F. Supp. 175, 188.

10/ There is a suggestion in the opinion of the Court of Appeal (pp. 4-5 thereof, appearing at p. A-5 of this Petition) that petitioners seek such costs "in addition to the value of the property that was taken". This is simply not so; Petitioners seek nothing "in addition to"

(continued)

The net result is that the Courts of Appeal - while ostensibly paying lip service to General Motors in its opinion - has refused to follow the General Motors rule. The very factors which this Court decreed to be properly considered in a temporary condemnation were excluded, with the result that Petitioners were deprived of the benefit of the Fifth Amendment's guarantee of just compensation.

To paraphrase the celebrated expression of the late Secretary of Defense Charles Wilson, what is good for General Motors should be good for a Los Angeles shopkeeper named Sol Siegel. That is all Petitioners ask.

CONCLUSION

Petitioners respectfully urge that the incidence of eminent domain has reached unprecedented proportions, and has brought about serious problems of national scope, which nonetheless have not received from the judiciary the attention they deserve.

10/ Continued:

their just compensation; they seek only to receive their just compensation and to have it determined on the basis of applicable constitutional principle as declared in General Motors.

The rule whereby today large numbers of faultless citizens are economically ruined in the name of "just compensation", was evolved in the last century, in a basically agrarian society in which such rule was of infrequent incidence and produced little hardship. See "Eminent Domain Valuation in an Age of Redevelopment: Incidental Losses", 67 Yale L.J. 61, 65 (fn. 15-19 and accompanying text), and "Relocation: Unequal Treatment of People and Businesses displaced by Governments", Advisory Commission in Intergovernmental Relations, (January 1965), pp. 5-6.

In today's urban, commercial/industrial society the rule operates unfairly and irrationally, and inflicts injustice on a large scale. The grim reality is that to a small, one-location businessman, expropriation by eminent domain is tantamount to outright confiscation or destruction of the economic end product of a lifetime's work. That this is done in the name of "just compensation" which is supposed to "evoke[ ] ideas of 'fairness' and 'equity' ", 11/ should give the Court pause, and should call for a fundamental re-examination of the frankly 19th Century notions underlying the denial of compensation for destruction and taking of business goodwill: a valuable, marketable, taxable asset accumulated by years of labor.

11/ U.S. v. Virginia P & E Co. (1961) 365 U.S. 624, 631; U.S. v. Commodities Trading Corp. (1950) 339 U.S. 121, 124.

Petitioners respectfully urge the Court that the Writ of Certiorari issue as prayed for.

Respectfully submitted,

HYMAN GOLDMAN,
JERROLD A. FADEM,
GIDEON KANNER

Attorneys for Petitioners

APPENDIX "A"

APPENDIX "A"

A majority of the signers of the following opinion certify that it does not meet the standard for official publication under Rule 976.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE CITY OF LOS ANGELES, a municipal corporation, Plaintiff and Respondent, vs. SOL SIEGEL and BESSIE SIEGEL, Defendants and Appellants.	) 2nd Civil) No. 32887) Court of) Appeal -) Second) Dist.) FILED) Jul 28 69 Clay Robbins, Jr. Clerk

Appeal from judment of the Superior Court of Los Angeles County. William B. Neeley, Judge. Affirmed.

For Appellants: Fadem and Kanner, Gideon Kanner.

For Respondent: Roger Arnebergh, City Attorney, Peyton R. Moore, Jr., Assistant City

Attorney, Gary R. Netzer, Deputy City Attorney, Norman L. Roberts, Deputy City Attorney.

Sol Siegel and wife appeal from a judgment in condemnation claiming insufficiency of the award in their favor. The record on appeal consists of the judgment roll, a narrative statement and certain pretrial orders.

Appellants owned a property fronting on Hoover Street in Los Angeles having an area of 11800 square feet (118' x '100'); there were three brick buildings on the property. The city took a strip 17' x 118' (2056 square feet) and removed the buildings which were partly within and partly without the area taken; it also took temporary possession of the remainder of the property for removal of the buildings. Appellants were compensated by judgment for the land and improvements taken or damaged and for the value of the temporary right of entry to demolish or remove the buildings.

Appellants owned and operated a dress shop and a dime store on the premises. The court found that by reason of the taking appellants would suffer loss of business profits, loss of goodwill, would incur costs of moving the inventory to storage, storing it and moving it back to the property; there would be a loss in the value of the inventory. It was also found there would be a loss of use during construction of new improvements of the parcel not taken. By its findings and judgment the court determined that none of these losses was compensable. This is

the question presented on the appeal.

The loss of business and goodwill. In the California cases and in the federal courts it has been consistently held that when the fee title to real property is taken in condemnation, business interests and goodwill that are lost through the taking do not constitute property for which the condemnee must be awarded compensation under constitutional and statutory law. A few of the state cases are Breidert v. Southern Pacific Co., 61 Cal. 2d 659; People v. Ayon, 54 Cal. 2d 217; People v. Ricciardi, 23 Cal. 2d 390, 396; Oakland v. Pacific Coast Lumber etc. Co., 171 Cal. 392. Federal cases are Joslin Mfg. Co. v. City of Providence, 262 U.S. 668; Mitchell v. United States, 267 U.S. 341, 345; A. G. Davis Ice Co. v. United States, 362 F. 2d 934, 936; United States Ex Rel. T.V.A. v. Powelson, 319 U.S. 266, 282.

In United States v. General Motors Corp., 323 U.S. 373, a case relied upon by appellants, the court said at page 379: "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign."

Appellants say that goodwill is defined as property by sections 654 and 655 of the Civil

Code and section 14102 of the Business and Professions Code; they argue that these statutory provisions were evidently overlooked by the courts that have refused to recognize goodwill as property which cannot be taken or damaged without payment of compensation. Appellants say their contention is novel, and we agree that it is.

Appellants have referred to no case in which a court held that goodwill is not property, and we doubt there is such a case. In the condemnation cases in which compensation has been sought for the loss of goodwill the basis of the claim necessarily has been that goodwill is property. The courts have held only that it is not property of the kind that is taken or damaged in condemnation proceedings, even though it be lost.

The expense of moving, storing and returning the inventory and loss in value of the same while in storage are claimed as damages as a consequence of the taking of the easement and the buildings. In their argument that it was error to disallow these items appellants rely upon United States v. General Motors Corp., supra, 323 U.S. 373, and Kimball Laundry Co. v. United States, 338 U.S. 1. In General Motors the condemnee had a leasehold interest in a building; the government took possession under condemnation of only a part of the term and surrendered possession before the end of the leasehold. In Kimball the government took possession of an

entire laundry plant for a one year term subject to extension. In General Motors compensation was allowed for the expense of removing business property and returning it to the premises. In Kimball when the government took possession of the building and laundry machinery compensation was awarded for the loss of delivery routes. Appellants contend that these cases establish a rule that when the premises are taken for only temporary use the condemnee is entitled to recover as consequential damages the expense of moving out and returning to the property. They say the city occupied a part of the property that was not taken; they were required to vacate the premises temporarily and should have been paid for their expense of moving and loss in the value of their inventory. General Motors and Kimball give no support to this contention. The expenses that were allowed in General Motors were not in addition to the value of the property that was taken. The disruption of the business, the moving out and back again lessened the market value of that portion of the property that was taken and the expenses were allowed to compensate for this loss in market value. The opinions in General Motors and Kimball state clearly that when the entire interest is taken purely consequential damage is not compensable. It is only when incidental detriment affects the market value of what is taken that the condemnee will be compensated for the expense he has incurred or other loss.

In General Motors the court said at page 382: "Whatever of property the citizen has the Government may take. When it takes the

property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what it has taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.

"It is altogether another matter when the Government does not take his entire interest, but by the form of its proceedings chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

In Kimball the allowance for the loss of laundry routes was explained as one that would not have been granted had the entire interest of the condemnee been condemned. The court stated at pages 11 and 12: "What, then, are the circumstances under which the Fifth Amendment requires compensation for such an intangible? Not, indeed, those of the usual taking of fee title to business property, but the denial of compensation in such circumstances rests on a very concrete justification: the going-concern value has not been taken. Such are all the cases, most of them decided by State courts under

constitutions with provisions comparable to the Fifth Amendment, in which only the physical property has been condemned, leaving the owner free to move his business to a new location.... In such a situation there is no reason for a taker to pay for the business' going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss, like the cost of moving, is denied compensation as consequential."

In United States v. Westinghouse Elec. & Mfg. Co., 339 U.S. 261, the government had taken a leasehold interest and had remained in possession until the leasehold of Westinghouse was exhausted. Distinguishing the facts of General Motors in which moving costs were allowed as a reduction of the market value of the leasehold interest taken, the court applied the general rule that moving expenses of personal property are not allowed when an entire leasehold interest or whether ownership is condemned. This is the settled rule in California. County of Los Angeles v. Signal Realty Co., 86 Cal. App. 704; City of La Mesa v. Tweed & Gambrell Mill, 146 Cal. App. 2d 762, 776; Town of Los Gatos v. Sund, 234 Cal. App. 2d 24, 26.)

Appellants were awarded the value of the land and the buildings that were taken. They received the value of the temporary occupancy

while the building was being demolished. They have received fair and adequate compensation.

The judgment is affirmed.

SHINN, J.*

We concur.

FORD, P. J.

SCHWEITZER, J.

---

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

THE BRIEF SHOP
legal printers

10844 VENTURA BLVD.. NORTH HOLLYWOOD
POPLAR 3-2965 TRIANGLE 7-8620

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 19 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROGER ARNEBERGH,
City Attorney,
PEYTON H. MOORE, JR.,
Assistant City Attorney,
NORMAN L. ROBERTS,
Deputy City Attorney.
2100 City Hall,
Los Angeles, Calif. 90012,
(213) 624-5211,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

	Page
Statement	1
Questions Presented	2
Statutes Involved	2
Argument	3
I.	
Loss of Business or Damage to Business Goodwill Is Not Compensable Under the Fifth and Fourteenth Amendment	3
a. Business Goodwill Is Seldom, if Ever, Destroyed by a Taking of the Real Property Which the Business Occupies	4
b. Business Goodwill Is Merely an Expectancy. Though Protected Against Unlawful Interference, and Though Transferable, It Is Not Property in the Constitutional Sense	6
II.	
The Taking Involved in the Within Petition Is Not Comparable to That Involved in United States v. General Motors, 323 U.S. 373	7
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases	Page
Belle' Isle v. Hempy, 206 Cal. App. 2d 14	6
Colberg Inc. v. State of California, 67 Cal. 2d 408	7
A. G. Davis Ice Company v. United States, 362 F. 2d 934	3
Handyspot Co. v. Buegeleisen, 128 Cal. App. 2d 191	6
Hooten v. United States, 405 F.2d 1167	5
Hunt v. Phinney, 177 Cal. App. 2d 212	6
Joslin Mfg. Co. v. City of Providence, 262 U.S. 668	3
Kimball Laundry Company v. United States, 338 U.S. 1	3, 5
Mitchell v. United States, 267 U.S. 341	3
People v. Walker, 33 Cal. App. 2d 18	6
Stipe v. United States, 337 F. 2d 818	3, 5
United States v. Certain Lands, 183 F. 2d 320	3
United States v. General Motors Corp., 323 U.S. 373	3, 7, 8
United States v. Petty Motor Co., 327 U.S. 372	3
United States v. Rands, 389 U.S. 121	7
United States v. 26,699 Acres of Land, 174 F. 2d 367	3
United States v. Westinghouse E. & Mfg. Co., 339 U.S. 261	8
R. J. Widen v. United States, 357 F. 2d 988	3

Statutes

	Page
California Business and Professions Code, Sec. 14100	2, 6
California Business and Professions Code, Sec. 14102	4, 6
California Civil Code, Sec. 654	6
California Civil Code, Sec. 655	4
California Civil Code, Sec. 655	6
United States Constitution, Fifth Amendment	2
United States Constitution, Fourteenth Amendment	2

IN THE

Supreme Court of the United States

October Term, 1969
No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This is a condemnation case in which a portion of a parcel of land owned by respondents was acquired for street widening. All of the buildings on the parcel—both within and outside the street area—were acquired and demolished.

Petitioners owned the land and buildings. They also operated two businesses in the buildings. They closed both businesses and placed their inventory and equipment in storage. After demolition was completed they constructed a new building, moved their equipment and inventory into it—and reopened.

Petitioners were paid in full for the taking and damaging of the land and buildings.

Questions Presented.

1. Do the Fifth and Fourteenth Amendments require a condemnor to pay damages for loss of, or damage to, business goodwill, when full payment has been made for the taking and damaging of the real property on which the business was located?

2. When the condemnation requires the total demolition of structures upon land, and consequent temporary occupation of the land during demolition, and also a permanent taking of a portion of the land, is the owner-occupant entitled to be compensated for the moving and storage expenses he has incurred in moving out, and after building a new building, moving back in?

Statutes Involved.

In addition to those statutes cited and relied on by Petitioners, the following statute is involved herein:

> "The 'good will' of a business is the expectation of continued public patronage." Calif. Bus'n & Prof. Code §14100.

ARGUMENT.

I.

Loss of Business or Damage to Business Goodwill Is Not Compensable Under the Fifth and Fourteenth Amendment.

This court has consistently held that loss of business, profit, or goodwill which occurs as an incident of a condemnation of land and buildings is not compensable. See: *Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 675 (1922); *Mitchell v. United States,* 267 U.S. 341, 345 (1925); *United States v. General Motors Corp.* 323 U.S. 373, 379 (1945); *United States v. Petty Motor Co.,* 327 U.S. 372, 377-378 (1946); *Kimball Laundry Company v. United States,* 338 U.S. 1, 11-12 (1949); and in the lower Federal Courts: *R. J. Widen v. United States,* 357 F. 2d 988, 993-994 (Ct. of Claims, 1966); *Stipe v. United States,* 337 F. 2d 818, 821 (10th C., 1964); *A. G. Davis Ice Company v. United States,* 362 F. 2d 934, 936 (1st C., 1966); *United States v. Certain Lands,* 183 F. 2d 320, 321 (3rd C., 1950) and *United States v. 26,699 Acres of Land,* 174 F. 2d 367, 368 (5th C., 1949). As stated in *General Motors* at page 380:

> "Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership *does not include losses to his business or other consequential damage.*" (emphasis added).

Petitioners have recognized the existence of these cases and the general rule (Petition, p. 14), but argue that the rule should be changed because "an ever-growing segment of the population" (Petition, p. 9) is facing acquisition of their property for public use; and that the rule should be changed in California because California statutes say that business goodwill "is property and is transferable" (Calif. Bus'n & Prof. Code §14102) and include "good-will of a business" as a subject of ownership. (Calif. Civil Code §655.)

a. Business Goodwill Is Seldom, if Ever, Destroyed by a Taking of the Real Property Which the Business Occupies.

With respect to the first argument, we fail to see how an increase in the number of condemnations is relevant to the problem of whether business losses are to be compensated. The goodwill of a business, if it had any, is not destroyed by condemnation of the land it occupies. The goodwill may be retained if the business is relocated.

This case is a perfect example of why business goodwill should not be considered in condemnation cases. Mr. and Mrs. Siegel owned both the real property and the businesses. Upon the condemnation of their land and buildings—for which they were fully compensated—they could have relocated their businesses. After Hoover Street was built they could sell the land. They were not required by the city—or by anyone—to close their businesses during the construction period. This was their own choice. Yet they seek to have the city pay for the consequent damage or destruction of the goodwill of their two businesses.

If the exercise of the power of eminent domain adversely affects the small businessman, it is not because his property is taken. It is because the public improvement causes his customers to relocate to another neighborhood, or because it becomes inconvenient for his former customers to reach his place of business. In other words, these small businessmen may often survive only if the *status quo* is maintained. Certainly a person does not have a property right in the *status quo*. (*Stipe v. United States,* 337 F. 2d 818 (10th C., 1964) where plaintiff sought damages because the truckers who were his customers utilized a new highway rather than the old highway.) Neither does a person have a property right in his customers. (*Hooten v. United States,* 405 F.2d 1167 (5th C., 1969) in which plaintiff lost his contracts to maintain tenements located in the El Paso "Chamizal" area which was ceded to Mexico.)

Indeed, in *Kimball Laundry Co. v. United States,* 338 U.S. 1, 12 (1949) this court said of "good will" and "going-concern value:"

> "In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded."

Business losses are not compensable because they are not primarily caused by the condemnation of the land on which the business is located. They merely occur at the same time.

b. Business Goodwill Is Merely an Expectancy. Though Protected Against Unlawful Interference, and Though Transferable, It Is Not Property in the Constitutional Sense.

Petitioners argue that because business goodwill is listed as an item subject to ownership it therefore is compensable when taken or damaged for public use. This does not follow. "Property" and "ownership" as used in the California statutes describes relationships between persons. It does not refer to things or to "rights" in the abstract.

Under California law there may be a property right in an expectancy, a thing, or a privilege as between private persons, but not as between the owner and the government. (See *People v. Walker,* 33 Cal. App. 2d 18, 20 (1939) relating to burglary of slot machines; and *Belle' Isle v. Hempy,* 206 Cal. App. 2d 14, 16 (1962) relating to a liquor license.) All that California Civil Code Sections 654 and 655 and California Bus'n & Prof. §14102 mean is that business goodwill will be protected by the courts (*Hunt v. Phinney,* 177 Cal. App. 2d 212, 216 (1960)) and is transferable (*Handy-spot Co. v. Buegeleisen,* 128 Cal. App. 2d 191, 195 (1954).) The statutes do not convert goodwill into a tangible thing—or vested right—which is protected by the eminent domain provisions of the constitution.

Indeed, business goodwill is but an expectancy, and is so defined by Calif. Bus'n & Prof. Code §14100:

> "The 'good will' of a business is the expectation of continued public patronage."

One is not entitled to compensation for the frustration of an expectancy, even though the expectancy has value and is marketable. Both this court, in *United States v. Rands,* 389 U.S. 121, 124 (1967), and the California supreme court, in *Colberg Inc. v. State of California,* 67 Cal. 2d 408, 416 (1967), have denied compensation based upon the value of the right to navigate a river. The courts, in each case, recognized that a *right* existed, but one "not assertable" against the sovereign. Similarly, the "expectancy of continued patronage" is salable—but it is not such an interest as to be compensable when land and buildings are acquired for public use.

II.

The Taking Involved in the Within Petition Is Not Comparable to That Involved in United States v. General Motors, 323 U.S. 373.

Petitioners, in their claim for moving expenses argue that *General Motors* requires that such expenses be paid whenever there is a temporary taking, and, that the "doctrine" of *General Motors* is applicable to the states.

With respect to the latter argument, they say, at page 18 of the petition: "It does not seem open to serious argument that this court's construction . . . is binding on the states. . . ." No citation of authority nor any reasoning supports this assertion. To the contrary, to our knowledge, the alleged "doctrine" of *General Motors* has not been followed at all. In *United States*

v. Westinghouse E. & Mfg. Co., 339 U.S. 261, 263-264 (1950) it is explained that *General Motors* applied only when the Government "*desires merely temporary occupancy of premises under lease.*" And, even then, *General Motors* said evidence of moving costs, storage fees, and etc. was admissible only to determine the market value of the temporary occupancy, "not as independent items of damage" (323 U.S. at 383) which the petitioners are claiming.

The factual distinctions between the facts of the within petition and of *General Motors* are great. Here, the condemnees were left with a fee interest in usable vacant land, located on a newly improved street. It was readily salable. General Motors was left, after the taking, with four, or less, years of an original 20 year lease. The short term occupancy which remained was unlikely to be salable.

Under the facts of *General Motors,* it could be said the condemnee was forced to "move out, store, and move in," or, in the alternative, pay rent for the remainder of the lease after the Government surrendered possession. Here, only one move was necessary if petitioners relocated their businesses. They chose not to do so.

Conclusion.

Both the damage to business goodwill and the extra moving expenses occurred because petitioners, Mr. and Mrs. Siegel, were unwilling to move their business to new locations. Had they done so, they could have "trans-

ferred" the goodwill and eliminated more than one-half of the moving costs.

For this reason, and also because the general rule relative to business losses and moving expenses is correct, their petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
PEYTON H. MOORE, JR.,
Assistant City Attorney,
NORMAN L. ROBERTS,
Deputy City Attorney.
By PEYTON H. MOORE, JR.,
Attorneys for Respondent.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court,
FILED
JAN 27 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

HYMAN GOLDMAN
JERROLD A FADEM
GIDEON KANNER
6505 Wilshire Blvd.
Los Angeles, Calif. 90048

Attorneys for Petitioners

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

HYMAN GOLDMAN
JERROLD A FADEM
GIDEON KANNER
6505 Wilshire Blvd.
Los Angeles, Calif. 90048

Attorneys for Petitioners

TOPICAL INDEX

		Page
1.	THE CITY'S ARGUMENTS RE COMPENSABILITY OF GOODWILL CONTRADICT THE RECORD AND AUTHORITY.	1
2.	THE CITY'S ARROGANT DISREGARD OF THIS COURT'S DECISION IN U.S. V. GENERAL MOTORS IS SYMBOLIC OF WHAT IS WRONG WITH THE TREATMENT METED OUT TO PETITIONERS BELOW.	5

TABLE OF AUTHORITIES

Cases	Page
Miller & Lux v. Richardson (1920), 182 Cal. 115, 187 Pac. 411	3
U.S. v. Certain Parcels, etc. (1945), 63 Fed. Supp. 175	5
U.S. v. General Motors (1944), 323 U.S. 373	4, 5
U.S. v. Rands (1967), 389 U.S. 121	4
U.S. v. Willow River Power Co. (1945), 324 U.S. 499	4
Constitution	
California Constitution: Art. 13, §1	3
United States Constitution:	
Fifth Amendment	4, 6
Fourteenth Amendment	6
Statute	
California Revenue & Taxation Code: §201	3

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1969

No. 989

SOL SIEGEL and BESSIE SIEGEL,

Petitioners,

vs.

CITY OF LOS ANGELES,

Respondent.

PETITIONERS' REPLY BRIEF

1.

THE CITY'S ARGUMENTS RE COMPENSABILITY OF GOODWILL CONTRADICT THE RECORD AND AUTHORITY.

On the issue of compensability of goodwill, Respondent (hereafter the City) has made two

arguments in its brief (p. 4) which lack foundation in the record or in reality. 1/

1. The City says that the Siegels ". . . could have relocated their businesses", but the record at bench belies that argument. No such evidence is found in the record. To the contrary, the Court will recall that the instant condemnation arises out of a street widening which caused land to be taken and buildings to be demolished along Hoover Avenue, for many blocks. See map attached to the Complaint in Condemnation, appearing at p. 19 of the Certified Record herein. The map depicts graphically how the street widening cut into properties fronting on Hoover Avenue for blocks on end.

Therefore, query: how does one go about relocating his business, where most, if not all, suitable buildings in the area have been demolished?

The cold, harsh fact is that the Siegels' business could not be relocated. The City's suggestion of relocation, thus bears a distinct kinship to Marie Antoinette's suggestion to starving Parisians that they eat cake.

1/ It bears noting that the City does not dispute the substantiality of the questions presented, and effectively concedes the widespread impact of the present unfortunate state of the law of just compensation as applied to business losses caused by expropriation.

2. The City's second fallacious argument that "[b]usiness [g]oodwill [i]s [s]eldom, if [e]ver, [d]estroyed by a [t]aking . . . " is an attempt to exorcise reality by bald assertion. Neither the record herein nor any data ascertainable from scholarly or other publications, lend any support to that assertion. On the contrary, such data as are available after painstaking factual investigations by various governmental agencies, compel the conclusion that the contrary is true: a majority of business proprietorships are permanently destroyed by a taking of the land upon which they are located. 2/

Finally, Petitioners note the City's ingenious argument (made for the first time in its brief filed in this Court) that a statutorily defined and judicially protected property right is subject to confiscation simply because it can be characterized as an "expectation". 3/ But every property

---

2/ See authorities cited in Petition for Certiorari, fn. 2, 3, 4 and 5 at pp. 8-10 thereof.

3/ Significantly, when California governmental entities want to tax goodwill, they experience no difficulty in treating goodwill as "property" rather than an "expectation". See Miller & Lux v. Richardson (1920), 182 Cal. 115, 127-128, 187 Pac. 411, which taxes goodwill as of course. The significance lies in the fact that California's powers of taxation extend only to "property". Calif. Const., Art. 13, §1, Calif. Revenue & Taxation Code §201.

interest known to the law is in that sense an "expectation" that the owner thereof will be permitted to exercise his dominion and control over, or to enjoy the use and benefit of the particular interest, without uncompensated invasion by others. The owner's right to have his "expectation" protected by the legal institutions of his society, is foundational to the whole concept of private property, 4/ and the Fifth Amendment simply establishes that legal protection as against governmental entities.

Nor does the City's argument find support in the authorities cited by the City. Navigation control cases such as U.S. v. Rands (1967), 389 U.S. 121, do not rest on any sweeping and simplistic notion that "expectancies" are not "compensable", but rather on the principle that in those cases the government owns an antecedent right to improve, maintain and control the means of navigation. The riparian owner is held in such cases not to own the navigable waters, and hence he is not compensated when the government exercises dominion and control over what the government owns. See U.S. v. Willow River Power Co. (1945), 324 U.S. 499, 508-509.

4/ The reference to "property" in the just compensation clause of the Fifth Amendment, conceives of property not as " . . . the physical thing with respect to which the citizen exercises his rights recognized by law", but as " . . . the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." U.S. v. General Motors (1944), 323 U.S. 373, 377-378.

But surely the City is not suggesting that it somehow has a comparable antecedent proprietary interest in the goodwill of Sol Siegel's dime store.

2.

THE CITY'S ARROGANT DISREGARD OF THIS COURT'S DECISION IN U.S. V. GENERAL MOTORS IS SYMBOLIC OF WHAT IS WRONG WITH THE TREATMENT METED OUT TO PETITIONERS BELOW.

Nothing that Petitioners can say would speak as eloquently of the disregard of Petitioners' constitutional rights in the case at bench, as the short shrift given by the City to this Court's decision in U.S. v. General Motors (1944), 323 U.S. 373. (See p. 7 of the City's brief, where the City dismisses General Motors as expounding an "alleged 'doctrine'" which - according to the City - "has not been followed at all"). 5/

5/ The City's disdain for the "alleged 'doctrine'" of General Motors apparently manifests itself only when the City is a condemnor. When the City is a condemnee, it sees nothing wrong with following General Motors. Cf. U.S. v. Certain Parcels, etc. (1945), 63 Fed. Supp. 175, 188 [16].

For once, Petitioners must agree with the City: the applicable constitutional principle "has not been followed at all" in the case at bench. Neither has the just compensation command of the Fifth Amendment, nor the due process clause of the Fourteenth.

All the more reason why the instant Petition should be granted.

Respectfully submitted,

HYMAN GOLDMAN
JERROLD A. FADEM
GIDEON KANNER

Attorneys for Petitioners